



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT PA15-0195

April 25, 2017

**Matthew Francis (Falmouth)**

v.

**Amistad (Portland)**

### **I. Summary of Case:**

Complainant alleged that Respondent, a place of public accommodation offering services to people with mental illness, discriminated against him on the basis of sex and sexual orientation (gender identity) by subjecting him to a hostile environment and by denying him full and equal access to its services. Respondent denied discrimination and alleged that Complainant was treated the same as other patrons and was allowed full access to its services. The Maine Human Rights Commission Investigator conducted a preliminary investigation, which included a thorough review of the materials submitted by the parties, and an Issues and Resolution Conference. Based on this information, the Investigator recommends that the Commission make a finding that there are reasonable grounds to believe that Respondent discriminated against Complainant by subjecting him to a hostile environment, and no reasonable grounds to believe that Respondent otherwise denied Complainant full and equal access to its services.

### **II. Jurisdictional Data:**

- 1) Date of alleged discrimination: January 9, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 27, 2015.
- 3) Respondent is a place of public accommodation and is subject to the Maine Human Rights Act ("MHRA").
- 4) Complainant is represented by Zack Paakkonen, Esq. Respondent is represented by Richard Moon, Esq.

### **IV. Development of Facts:**

- 1) Complainant provided the following in support of his claims:

Complainant was subjected to a hostile environment due derogatory statements made by a fellow patron ("Patron") when Complainant was attempting to receive services from Respondent. Patron

used the terms "it," "thing," and "he-she" in an attempt to dehumanize him because he is transgender. Patron made such statements as "that thing doesn't belong here" and "get that thing out of here." Patron's language was extremely offensive and humiliating and created an abusive environment for Complainant. Complainant reacted by raising his voice and calling her a "fat bitch," but only after Patron had repeated the offensive names 7-8 times and after Respondent did nothing to stop her behavior. Complainant never threatened Patron and did not physically obstruct her or attempt to strike her. Respondent asked Complainant to leave after the incident, despite the fact that he was the victim. Patron was not asked to leave and suffered no consequence as a result of her actions. In contrast, Complainant was told that he could not receive further services from Respondent unless he participated in a "peer review," during which a panel of other patrons would assign him a form of punishment for alleged misconduct. Complainant refused to attend the peer review because he did nothing wrong. Respondent did not require Patron to attend a peer review despite her harassment, which shows Complainant was treated less favorably due to his sex and sexual orientation.

2) Respondent provided the following in support of its position:

While Patron used inappropriate language toward Complainant, the language was not severe or pervasive enough for Complainant to establish a hostile environment claim. Respondent took appropriate action to address Patron's behavior by immediately speaking with her and counseling her about the use of inappropriate language. Patron was not required to appear for a peer review because she was not found to have acted in a threatening manner such as Complainant, and her behavior was only considered "borderline." If she had used hate speech or threatening language, she would have been requested to appear for a peer review, as is standard practice. Witnesses reported that Complainant had been the aggressor during the incident and acted far worse than Patron by using hate speech and by verbally and physically threatening her. Respondent acted reasonably and consistently with standard practice when it asked Complainant to leave following the incident in an attempt to diffuse the situation, and when it required Complainant to attend a peer review prior to accessing further services from Respondent. Complainant was never denied access to Respondent's services, and chose not to receive them when he refused to appear for peer review.

3) The Investigator made the following Findings of Fact:

- a) On January 9, 2015, Patron used derogatory terms against Complainant based on gender identity. The extent of the terms used remain in dispute between the parties (such as the use of "fag"), but it is undisputed Patron referred to Complainant as "it" and likely used the terms "he-she" and "thing."
- b) Complainant responded strongly to the incident and likely behaved in a threatening manner. While Complainant denies threatening Patron, an incident report and witness statements dispute this and Complainant acknowledged he raised his voice and called Patron a "fat bitch." He also acknowledged he was told to "calm down" before being asked to leave.
- c) An incident report submitted by Respondent states that Complainant called Patron a "fat fucking bitch," told Patron he was going to "fuck her up," and attempted to block her by standing in her way.<sup>1</sup> The report also states that witnesses confirmed Patron called Complainant "an it," which started the altercation.

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<sup>1</sup> The incident report also states Complainant tried to punch Patron, but Respondent later acknowledged that it is unclear whether this was actually witnessed.

- d) A police report submitted by Complainant shows that Complainant called the police to report harassment directly following the incident, and that Complainant told the responding officer that Patron called him an "it," a "thing," and a "he-she." It also states Complainant heard Patron whisper "fag" in his direction before he left.
- e) Respondent has a practice of requiring patrons to appear for peer review before accessing additional services when patrons are accused of misconduct, including the use of "hate speech" or the use of threatening language and behavior. The peer reviews are held weekly, and involve a panel of other patrons that decide whether the accused patron was guilty of misconduct, and what, if any punishment that patron should receive. Examples of punishment include issuing an apology or doing cleaning for Respondent.
- f) Respondent informed Complainant that, due to his behavior during the incident with Patron, he would be required to appear for a peer review before he could access additional services. Patron was not required to attend peer review.

## V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statutes ("M.R.S.") § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The public accommodations provision of the MHRA provides, in relevant part, that it is unlawful to "discriminate against or in any manner . . . deny the full and equal enjoyment to any person, on account of . . . sex, sexual orientation. . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation. . . ." 5 M.R.S.A. § 4592(1).

### *Hostile Environment*

- 3) The MHRA does not explicitly address claims of harassment by a place of public accommodation. In the employment context, the MHRA, following federal law, has been interpreted to include claims involving a "hostile environment." *See, e.g., Bowen v. Department of Human Services*, 606 A.2d 1051, 1053 (Me. 1992). Similarly, "hostile environment" claims have been extended to Title III of the Americans with Disabilities Act, which has similar wording to the public accommodations provision in the MHRA. *See Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 314 (D. Mass. 1997). *Compare* 5 M.R.S.A. § 4592(1) *with* 42 U.S.C. § 12182(a). Accordingly, a hostile public accommodations environment claim will be recognized here, and the standards from the employment context will be adopted. *Cf. Guckenberger*, 957 F. Supp. at 314.
- 4) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive [public accommodations] environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile public accommodations environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an [individual's enjoyment of a place of public accommodation]." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the [place of public accommodations] to

become hostile or abusive. *Id*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.

- 5) To establish liability on the part of the place of public accommodation for a hostile environment, Complainant must demonstrate that the place of public accommodation "knew or should have known of the charged [unlawful] harassment and failed to implement prompt and appropriate action." *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002).
- 6) Here, Complainant prevails in establishing a hostile environment claim by showing that he was subjected to discriminatory harassment that was severe enough to interfere with his enjoyment of a place of public accommodation and cause it to be both subjectively and objectively hostile, and by showing Respondent's liability due to its failure to take appropriate action. Reasoning is as follows:
  - a) It is clear from the record that Patron used offensive derogatory slurs based on gender identity against Complainant, and that the incident was severe enough to cause Complainant to become extremely upset and humiliated. This is supported in part by Complainant's reaction to the incident, as well as the police report, which shows Complainant immediately called the police to report the harassment. The report states that Patron called Complainant an "it," a "thing" and a "he-she" numerous times, and Respondent acknowledged that Patron had referred to him as "it."
  - b) While Respondent disputes the severity of the language used and argued it did not classify as hate speech, a reasonable person would consider "it" and the other language used to be offensive terms used to target a person's gender identity that would unreasonably interfere with that person's enjoyment of a public accommodation. As stated above, it is not necessary for harassment to occur more than once if it is severe enough to cause the environment to become hostile, and it appears that was likely the case here.
  - c) Respondent could not show that it took prompt and appropriate action in response to the harassment. Respondent acknowledged that it has a standard practice of requiring patrons who use hate speech to attend peer review as an appropriate consequence of their actions. Despite this practice, it is undisputed that Patron was not required to attend peer review, and was only spoken to about her use of inappropriate language because Respondent felt her behavior was "borderline" and did not constitute hate speech. It appears that Respondent deviated from its standard practice and took less than appropriate action to address and correct the harassment against Complainant in this case.
- 7) It is found Complainant was subjected to a hostile environment based on sex and sexual orientation.

*Full and Equal Access to a Place of Public Accommodation - Denial of Services*

- 8) Because the MHRA's statutory language on this point is similar to that in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), case law interpreting Title II is helpful in analyzing this claim.
- 9) In order to establish a prima-facie case of public accommodations discrimination, Complainant may show that he "(1) is a member of a protected class, (2) attempted to contract for services and afford himself of the full benefits and enjoyment of a public accommodation, (3) was denied the full benefits or enjoyment of a public accommodation, and (4) such services were available to similarly situated persons outside his protected class who received full benefits or were treated better." *Jackson v. Waffle House*,

*Inc.*, 413 F.Supp.2d 1338, 1361 (N.D.Ga. 2006) (Title II). With respect to the fourth element, "similarly situated persons" need not be identical, "but there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects." *Id.* at 1358 (citing *Lizardo v. Denny's Inc.*, 270 F.3d 94, 101 (2<sup>nd</sup> Cir. 2001)).

- 10) Once Complainant has established a prima-facie case, Respondents must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse treatment. *Id.* at 1355-56. *See also Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1262 (Me. 1979). After Respondents have articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet his overall burden at this stage by showing that (1) the circumstances underlying the articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that he would not have suffered the adverse treatment but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 11) Here, Complainant establishes a prima-facie case of sex and sexual orientation discrimination by showing that he is transgender, he attempted to obtain services from Respondent, he was told he could no longer receive services unless he participated in a peer review, and Patron – an arguably similarly situated person outside of his protected class – continued to receive services without being required to participate in peer review.
- 12) Respondent articulated a legitimate, nondiscriminatory reason for requiring Complainant to attend peer review, namely that he behaved in a threatening manner during the incident with Patron.
- 13) Ultimately, Complainant could not prevail in showing that Respondent's reason was false or irrelevant and that he was subjected to less favorable treatment based on sex or sexual orientation. Reasoning is as follows:
  - a) Respondent stated that its standard practice, regardless of protected class, is to require patrons to attend peer review if a patron acts in a threatening manner or uses hate speech. Complainant did not refute this, but instead denied that he acted in a threatening manner, and alleged that the fact that Patron was not required to attend the peer review is evidence of discrimination. There is certainly room for concern that Patron's insulting language was not considered hate speech, while Complainant's was. It appears, however, that the decision to require only Complainant to attend peer review was based on the perception that he was making physical threats against Patron.<sup>2</sup>
  - b) It was found that Complainant likely acted in a threatening manner during the incident with Patron. This is supported by mainly by the incident report stating Complainant threatened to "fuck up"

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<sup>2</sup> Respondent's statements do appear to indicate that they viewed Patron's language, directed at Complainant's gender identity, as somehow less offensive than Complainant's, directed at Patron's sex, which could be considered unequal treatment on the basis of protected class. Considering the entirety of the circumstances, however, it appears that the real reason for the difference in treatment was the perception by witnesses that Complainant was the aggressor.

Patron and physically obstructed her. There is no evidence that the incident report was fabricated by Respondent or that witnesses fabricated their statements for the report.

- c) Even though it is found that Patron incited the incident with Complainant by using derogatory statements against him, this does not change the fact that Complainant responded by acting in a threatening manner. Given Respondent's standard practice of using peer review in these type of incidents, it is not unreasonable that Complainant was held to that same standard.<sup>3</sup>
  - d) Respondent alleged that Patron was not required to attend peer review because her behavior was considered "borderline" in that she was not perceived as the aggressor in the confrontation. While this assessment may have ultimately been erroneous, it does not appear from the record that the decision was made because of discriminatory bias. While it was found here that Patron's comments should have been considered hate speech (see above), and that her language was sufficient to create a hostile environment for Complainant, she was not found to have behaved in a threatening manner. Complainant could not refute that peer reviews were used in incidents of threatening behavior regardless of protected class.
- 14) It was not found that Complainant was otherwise denied full and equal access to Respondent's services based on sex or sexual orientation.

## VI. Recommendations:

For the reasons stated above, it is recommended that the Commission issue the following findings:

- 1) There are **Reasonable Grounds** to believe that Amistad discriminated against Matthew Francis on the basis of sex and sexual orientation by subjecting him to a hostile environment; and
- 2) Conciliation of this portion of the charge should be attempted in accordance with 5 M.R.S. § 4612(3).
- 3) There are **No Reasonable Grounds** to believe Amistad otherwise discriminated against Matthew Francis on the basis of sex and sexual orientation by denying him full and equal access to a place of public accommodation; and
- 4) This portion of the case should be dismissed in accordance with 5 M.R.S. § 4612(2).

  
Amy M. Sneirson, Executive Director

  
Angela Tizón, Investigator

<sup>3</sup> To the extent Complainant is alleging unequal access to services when Respondent asked him to leave following the incident, Respondent's request is also being considered reasonable here given his behavior and Respondent's standard practice in similar situations.